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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KRISTEL CREWS et al.,

Plaintiffs and Appellants,

v.

LAURENCE FISHBURNE et al.,

Defendants and Respondents.

B204316

(Los Angeles County
Super. Ct. No. BC345929)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Mary Thornton House, Judge. Affirmed.

Nikki Tolt; Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon for
Plaintiffs and Appellants.

White O'Connor Fink & Brenner, Andrew M. White, David E. Fink and Jason Y.
Gross for Defendants and Respondents.

In January 2006, appellant Kristel Crews sued respondents Laurence Fishburne, The LOA Productions, Inc., and Cinema Gypsy, for employment discrimination based on pregnancy. The case was dismissed in October 2007, on a finding that appellant had failed to comply with court orders concerning discovery and had engaged in discovery abuse, that, in the words of the trial court, "so severely prejudiced the defendants in their defense that it would be an abuse of discretion by this court not to dismiss this case." Our review is abuse of discretion. (*American Home Assurance Co. v. Societe Commerciale Toutelectric* (2002) 104 Cal.App.4th 406, 435.) Finding none, we affirm.

Facts

The complaint

The causes of action were breach of contract, sex discrimination, violation of the Fair Employment and Housing Act, retaliation, failure to investigate and take prompt effective remedial action, and wrongful termination in violation of public policy. The factual allegations were that appellant was hired by respondents in November of 1999 as a personal/executive assistant, and fired on January 17, 2005, when she was due to return from maternity leave. She performed her job in a competent and exemplary manner and was fired because she had had a child. As to damages, appellant alleged that the stress caused by respondents' harassment caused her to give birth prematurely, and that she suffered severe emotional distress and other damages. She sought punitive damages.

The request for production of documents and the first order compelling production

On February 16, a month after the complaint was filed, respondents served a request for production of documents. Under the Code of Civil Procedure, responses were due on March 20. At appellant's request, respondents granted her two extensions of time, until April 17.

Appellant did not produce any documents on that date, although she did file a response. She made many objections, but wrote that she would produce documents

responsive to the 61 requests which were directly tied to the allegations of the complaint, all documents evidencing the terms and conditions of her employment with respondents, all documents relevant to damages and mitigation of damages, and all communications with respondents and their agents.

Respondents sent a meet and confer letter, but appellant did not respond. On May 16, 2008, respondents filed their first motion to compel, asking for an order that appellant produce all responsive documents and a privilege log for any document withheld. The motion was heard on July 27, 2006.

The day before the hearing, appellant's counsel wrote to respondents' counsel, saying that the copy service had finally finished copying the documents, and that "all responsive documents in my client's possession, custody and control will be produced except for the few items in issue in the Motion to Compel" At the hearing, appellant represented that there were over 30,000 documents responsive to the requests, and that she would produce them without delay.¹ (Of course, there had already been delay.)

Appellant also made various concessions. For instance, she had objected to a request for her unemployment insurance records. In a meet and confer letter, respondents had pointed out that the objection was not well-taken. In its tentative ruling (which has not been provided to us) the court apparently indicated that it agreed with respondents. At the hearing, appellant's counsel agreed too, saying "the court correctly noted that the employment insurance objection is not valid."

The parties had by then exchanged letters about discovery relevant to damages, including appellant's claim that stress had caused her to give birth prematurely. Before the hearing, appellant had offered to stipulate only that she would not be making a claim for mental and emotional distress "over and above that usually associated with" discrimination, harassment, and unjust dismissal. The tentative ruling apparently noted

¹ As respondents note, appellant referred to stacks of documents, although the invoices from her copying service suggest that she had already had the documents scanned to disk.

that this proposed stipulation did not limit the issues. At the hearing, respondents offered to withdraw any discovery concerning the child and childbirth, if appellant stipulated that she would not attempt to prove that stress related to the allegations of the complaint caused the premature birth of her child. Though she had earlier refused that kind of stipulation, appellant so stipulated.

The court ordered appellant to produce all responsive documents within 20 days, by August 15. Appellant's counsel represented that no privilege log was needed, because all documents would be produced, but the court ordered a privilege log for any document withheld from the production.

No sanctions were ordered, on the court's finding that most of appellant's objections had "some merit."

The production

Respondents had offered to arrange to have the documents copied, but appellant assured them that she could handle that chore. Following the July 27 hearing, there was some back and forth between counsel about reimbursement for the cost of copying. Appellant presented respondents with an "accumulative summary" of invoices and asked that the check be made out to her counsel, and respondents wanted actual invoices and to pay the copy service. In the end, on August 8, respondents made out the check to appellant's counsel in the amount on the summary (\$6,994), at which point appellant produced five computer disks, but no privilege log.

Respondents soon discovered that the disks were not usable. There were no document breaks to show where one document ended and another began, and nothing to show which documents were bound together or stapled or kept together in a file folder in the usual course of business. Instead, the 31,559 pages of documents were on the disks as 31,559 individual files, each of which could only be opened individually. Opening a single document took about 30 seconds. The documents could not be loaded into a standard document management system.

The second order compelling production of documents

On August 24, respondents filed a motion to compel appellant's compliance with the July 27 order, seeking an order that appellant produce the original documents and refund the \$6,994 they had paid for useless disks, and also seeking \$10,000 in sanctions.

The day after respondents filed the motion, appellant filed a motion titled a motion for protective order, in which she sought an order that her production complied with the earlier court order. The pleading was essentially an opposition to the motion. (She filed that pleading, too.) She complained that respondents had contacted the copy service and asked for the invoices, then had subpoenaed the invoices, and had also asked the copy service when the work was done and what work was done.

The motions were set for hearing on September 26, but were not decided on that date. Instead, in an effort to salvage the production, the court ordered appellant to make the documents available for inspection in the condition they were in when they were scanned, and asked for additional briefing on the difference between the disks and the documents. The court suggested that respondents bring experts to the inspection in the hope that there was "some way to save these disks."

Consistent with the court's order, respondents viewed the documents on October 2. At a hearing on October 12, they informed the court that they observed that many of the documents were indeed organized in files, sorted by date, or bound, clipped, or stapled together. Some, the "diaries," were in bound notebooks. Respondents' counsel declared that in an hour with the original documents, he learned more about the contents of the document production than he had in many hours of hunting through single documents on the disks. Respondents also presented evidence in support of their theory that appellant

had had useable, organized, searchable computer disks prepared for herself, but had had the codes stripped from the disks she produced.²

A new issue arose in this period. In a declaration attached to her opposition to the second motion to compel, appellant's counsel admitted that she had redacted portions of documents before they were scanned. This was the first time that respondents realized that there had been redactions.

The court later described this phase of the case thusly: "Significant resources were devoted to determining whether or not the computer discs produced to defendants were viable and thus, in compliance with the court order. Defendant claimed that the scanned materials were intentionally stripped of electronic codes so as to be rendered unusable. This court requested that the parties provide further information about the condition of the discs. At the following hearing, defense counsel provided the declaration of a computer expert who opined that electronic coding had been stripped. . . . Plaintiff provided no expert testimony in contradiction. The court was also provided information suggesting that the copying service was directed to strip the sequencing codes and that billings provided suggested that the majority of the copying costs were shifted to defendant who essentially subsidized plaintiff's counsel's copying for her own purposes. Regardless, this was the unchallenged condition in which the document production was carried out, and because the discs were worthless, no production had occurred."

² Appellant's counsel denied having had the disks coded, or stripped of codes, but at several points also said that after the documents were imaged, she had "additional work done," which was her work product. There was no finding of fact on the issue, although the court later noted that the evidence suggested that they were right. In her brief, appellant writes that at the October 12 hearing, respondents' counsel admitted that the disks had not been stripped of codes. Not so. Respondents' counsel merely represented that counsel for the copy service had taken exception to the word "stripped," and instead said that information was "omitted".

On October 27, the court denied appellant's motion for a protective order and granted respondents' motion to compel, finding that the documents had not been produced as required by the Code of Civil Procedure and ordering appellant to give respondents' copy service access to the files. The court awarded sanctions in the amount of \$5,000 against appellant's counsel, who was also ordered to refund the \$6,994.

The privilege log continued to be a problem. At the October 12 hearing, appellant's counsel again represented that there was no need for a privilege log because there were no "responsive, privileged documents." The court cautioned counsel that she could not make unilateral decisions about relevance, and the October 27 order included an order that appellant provide a specific privilege log for redacted documents.

Immediately after the hearing, appellant produced a document which she called a privilege log, but which consisted of objections. As the court later wrote "no redactions were identified and the objections were boilerplate."

Appellant's motion for reconsideration

On November 13, 2006, appellant filed a motion for reconsideration of the October 27 order. The court found that she presented no new law or facts, but "used the motion as a pretext to make impermissible re-argument" and to avoid payment of the sanctions previously ordered.

The court sanctioned appellant's counsel \$4,500 for bringing a frivolous, bad faith motion, writing that "Production should have been made in March, however, plaintiff's counsel has managed to delay production for well over half a year. Initially, the court believed that plaintiff's counsel was acting in good faith, however, it has become clear that plaintiff's counsel has an agenda which serves no legitimate purpose in litigation."³

³ Appellant filed a notice of appeal of this order, the earlier sanctions order, and the order that she refund the \$6,994 to respondents. We dismissed the appeal insofar as it concerned the two sanctions orders, because sanctions orders for amounts less than \$5,000 are not appealable. (Code Civ. Proc., § 904.1.) Appellant ultimately moved to dismiss the rest of the appeal, a motion which we granted.

In her motion and at the hearing, appellant took the position that no privilege log was needed because there were no privileged documents. Instead, she said that she had redacted parts of the documents because they were not responsive, and that a determination that a document was not responsive was not the same as a determination that the document was not relevant. The court told counsel that "if it's not relevant, then tell [respondents' counsel] what it was . . . but the point is there's been enough going on here to make anyone uncomfortable, including me, about the integrity of the document production."

The court ordered respondents to give notice of the ruling, and they did so. The notice states, correctly, that the court made its tentative ruling the ruling of the court. It says very little more. Appellant nonetheless filed an objection to the notice of ruling, contending that the notice did not reflect the court's "position" on several points (for instance, appellant wrote that the notice failed to reflect "the Court's position that the Court need not identify a specific Request for Production of Documents in making an order to produce a privilege log") also contending that the court's tentative ruling included an inaccurate recitation of the facts. As the court later ruled, this pleading "listed reasons why this court was incorrect in its ruling, not that the notice of ruling was incorrect."

The motion for terminating sanctions

On February 5, 2007, respondents moved for terminating sanctions. The declaration of counsel (and exhibits) attached to the motion establish that although respondents had by then copied the documents, in so doing, they had discovered that the redactions, which were in the notebooks which appellant referred to as diaries, were very numerous. The redactions were not logged, identified, or marked as such. Instead, respondents could find a redaction only by looking at a document and seeing white space, instead of the notebook's lined paper.

Respondents also declared that the notebooks were notebooks of employment assignments, appointments, and so on, and were responsive to the discovery requests.

Copies of the redacted pages were presented to the court and are in our record, and it is apparent that this is so.

Further, respondents attached letters from appellant's counsel which indicated that appellant would continue to refuse to comply with the court's orders concerning redactions and a privilege log. On January 8, appellant's counsel wrote, inter alia, that "only the responsive entries in the diaries will be produced. The non-responsive entries for which Ms. Crews claims the Constitutional Right of Privacy, will be redacted." The letter also indicated that no privilege log would be produced, claiming that respondents had failed to timely move to compel such a log.

By letter, respondents reminded counsel that the court had ordered appellant to produce a privilege log. In a letter dated January 10, 2007, appellant's counsel acknowledged that the court had made the order, but claimed that the order failed to identify any specific production request, leaving appellant "in a position where she does not know which production request for which she is required to produce a log." She also wrote that the court had "no authority to issue some kind of blanket 'privilege log' order," that the court was confused about the issue of the privilege log and that "the fact that the Court failed and refused to identify the specific production request to which its order applied further evidences the Court's misapprehension of the Discovery Code." The court later deemed this "just one of the many astonishing paragraphs in the letter."

Respondents' motion for terminating sanctions also cited appellant's bad faith motion for reconsideration and her objections to the notice of ruling on that motion, which respondents wrote were so outlandish and so self-contradictory that they could not possibly have been made in good faith. Finally, respondents cited the fact that the sanctions had not yet been paid.

The reference

The court did not immediately grant respondents' motion for terminating sanctions, but decided to send the matter to a referee, finding that "the documents provided by the plaintiff have been redacted in order to keep material and relevant

information from the defendants," but also finding that "there is no showing that plaintiff, herself, has willfully withheld information. Instead, plaintiff's attorney has engaged in litigation techniques which ensure that discovery responses will be provided in small amounts over a protracted period, in order to ensure that litigation costs to the defendants are extreme. Plaintiff's attorney's feigned ignorance of her obligation is actually a ruse from an attorney well aware that issue, evidence, and terminating sanctions will not be imposed where there has been limited compliance with the court's orders. That same feigned ignorance is also used to harass the defendants, increase litigation costs, and, delay resolution of the dispute. [¶] If this court believed that plaintiff was withholding evidence, rather than her counsel, then terminating sanctions would be warranted." The court did not award additional monetary sanctions, but did order appellant's counsel to pay the cost of the referee.

Appellant suggested retired Judge Alan Haber as the referee, and respondents agreed. On March 15, 2007, the court made the appointment. Hearing was not held before him until July, in part due to his unavailability, and in part because appellant failed to pay the fees, after numerous notifications.

Appellant sought to have Judge Haber conduct an in camera review of the redacted documents. He declined to do so, and after the hearing, appellant sent the documents to respondents, noting that she had reserved October 26, 2007 for a hearing on a motion for protective order, and that "In the interim, you may review the documents, but you may not copy or disseminate them." Respondents returned the box of documents without opening it. Both Judge Haber and the trial court deemed this belated document production, subject to more law and motion practice, another abuse of the discovery process.

Judge Haber reported on July 31, 2007, recommending that respondents' motion for terminating sanctions be granted, finding that appellant had been ordered to produce a privilege log but had not done so, had not produced documents as kept in the ordinary course of business, and had not paid the sanctions.

The order granting terminating sanctions

The court summarized the history of the case, noting that there was no reason for the first motion to compel, "other than plaintiff's attorneys refusal to produce documents in compliance with the discovery code," that the second motion was caused by appellant's failure to participate in a meaningful production and by a dubious monetary charge, and that the bad faith motion for reconsideration meant a third hearing on respondents' very first discovery request.

As to the redactions, the court wrote "Of particular concern to this court is a review of the 'diary' pages upon which it would appear that substantial redactions have occurred. . . . Up to this point, these diaries had been portrayed as items that were minimally to intensely personal and of no relevance to this lawsuit. The redacted pages (finally produced after three hearings involving orders to produce) . . . belie such a portrayal. These pages, redacted, reflect daily notations of work done or to be done for defendants. . . . [¶] There exists no doubt these 'diaries' comprise a business record and fit into the categories of records requested back February, 2006 and ordered produced in July 2006. Plaintiff clearly misses the point here when she asserts that these redacted entries are 'personal.' Plaintiff had placed her work duties and employment history at issue by the allegations in her complaint, thus, the documents as a whole are relevant or likely to lead to relevant evidence."

The court rejected appellant's theory that an in camera review was required, noting that without a privilege log respondents would be unable to make arguments and that "Taking a step backward and viewing the sequence of events as a whole results in the following conclusion: despite plaintiff's insistence in all of the hearings related to these notebook/dairies that production violates some right of privacy and redaction was necessary to insure that right, plaintiff has essentially waived those rights by failing to initially object, failing to timely move for a protective order, and failing to identify the specific text and the reason for the assertion of the privilege in a privilege log."

Discussion

"A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction." (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280.) The record here is one of willful violations, a history of abuse, and failure to provide discovery despite the imposition of lesser sanctions. A terminating sanction was in order.

In the face of this record of delay and intransigence, appellant makes the same tangled arguments she made in the trial court. She contends that the trial court did not order her to produce a privilege log, and that the trial court had no authority to order her to produce a privilege log because respondents did not properly move for such a log. She contends that respondents were not entitled to relief because they never made a motion to compel further responses, and that respondents never established a right to her personal and confidential diary notes or articulated specific facts justifying discovery of those notes. She repeats the specious claim that the redacted portions of the documents were not responsive, and that she was thus not obliged to produce them or log them. All of these arguments are unavailing. (She also argues that a terminating sanction cannot be imposed for counsel's failure to pay monetary sanctions. This case was not dismissed for that reason.)

When served with perfectly proper discovery, appellant responded with delay. When faced with a motion to compel, she made a meaningless production which did not comply with the Code of Civil Procedure. She redacted documents without informing respondents that she was doing so, and her method of production meant that the redactions were concealed from respondents. She refused to produce unredacted documents even after the trial court warned her that she could not unilaterally decide that a document was not relevant. She never produced a privilege log, despite repeated court

orders. She waited until the very eve of dismissal to seek an in camera review, and the delay speaks volumes about her litigation tactics.

As the trial court ruled, appellant was not entitled to unilaterally decide that certain notebook entries would not be produced. Respondent asked for business records. The notebooks were such records. Appellant was thus required to produce them.

Respondents did not fail to move to compel, or fail in any other way. They cooperated with appellant in the early days of this case, when it seemed that ordinary cooperation was called for, and acted vigorously to protect their rights, by means of motions to compel and motions for sanctions, when it became clear that vigorous actions were necessary. They obtained court orders, then sought to enforce those orders. Nothing else was necessary. (*Morgan v. Southern Cal. Rapid Transit Dist.* (1987) 192 Cal.App.3d 976, 984, disapproved on other grounds in *Schwab v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428, 434.) Nothing else was required of them.

"The most severe in the spectrum of sanctions must be available in appropriate cases not only to penalize those whose conduct may be deemed to warrant such a sanction, but also to deter those who might be tempted to flaunt discovery orders. [Citation.] The judicial system cannot tolerate litigants who flagrantly refuse to comply with orders of the court and who refuse to permit discovery. For delay and evasion are added burdens on litigation causing a waste of judicial and legal time, are unfair to the litigants, and offend the administration of justice." (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793, fn. 26, superseded by statute on other grounds as stated in *Guzman v. General Motors Corp.* (1984) 154 Cal.App.3d 438, 444.)

In choosing a sanction, the trial court should consider the totality of the circumstances, including the conduct of the offending party to determine if the actions were willful, detriment to the propounding party; the number of formal and informal attempts to obtain the discovery; and time spent avoiding or evading discovery. (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1246.) That is what the trial court did here.

Disposition

The judgment is affirmed. Respondents to recover costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.